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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

October Term, 1965

No. 877

NEW YORK CITY BOARD OF ELECTIONS, ETC.,

APPELLANT

vs.

JOHN P. MORGAN and CHRISTINE MORGAN

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

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for the District of Columbia

BRIEF FOR APPELLANT

Opinions Below

The case was instituted by appellees in the District Court for the District of Columbia, seeking a declaratory judgment declaring unconstitutional Section 4(e) of the Voting Rights Act of 1965 (P.L. 89-110, 79 Stat. 439), and an injunction restraining the Attorney General of the United States from enforcement of, and the members of the Board of Elections of the City of New York, from obedience to, the Act of Congress. Said Act provides that

"[n]o person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language * * *." The statute was declared unconstitutional by a statutory three-judge court convened pursuant to 28 U. S. C. §§2282 and 2284, Circuit Judge McGowan dissenting (R. 79, 92).* The injunction was granted by formal order dated December 7, 1965 (R. 102) but was stayed pending appeal (R. 109). Officially reported, 247 F. Supp. 196.

Statement of the Grounds of Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Sections 1252 and 1253.

The Notice of Appeal to the Supreme Court of the United States was filed January 5, 1966 in the United States District Court for the District of Columbia (R. 108).

Probable jurisdiction was noted January 24, 1966 upon the appeal of the New York City Board of Elections (No. 877), as well as that of the Attorney General of the United States (No. 847), and the cases were ordered consolidated (R. 110).

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* Numbers in parentheses, unless otherwise indicated are to pages of the Record on Appeal.

Constitutional Provisions and Statutes Involved

United States Constitution

Article I, §8, cl. 18:

> Section 8. The Congress shall have Power . . .
>
> . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article IV, §3 (in pertinent part):

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State.

Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment, §§1, 5:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

New York State Constitution

Article II, §1 (in pertinent part):

Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

United Nations Charter

Article 55 [59 Stat. 1045] (in pertinent part):

* * * the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Statutes Involved

Voting Rights Act of 1965, §4(e) [P. L. 89-110, 79 Stat. 439]:

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the pre-

dominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of an inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

New York State Election Law, §150 (in pertinent part):

* * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. * * *

Question Presented for Review

Whether the power of Congress, expressly granted by the Fourteenth Amendment, to prohibit state denial of the equal protection of the laws, extends to the basic right of suffrage and to barring state denial thereof to literate citizens of the United States, on the ground of language, where (1) it is universally recognized, i.e., by 117 nations signatory to the United Nations Charter, that denial of suffrage via language barriers constitutes unjustifiable discrimination; (2) the United States has committed itself by treaty to eliminating language barriers as conditions precedent to enjoying basic rights (U. N. Charter, Articles 55, 56), and specifically committed itself thereto in behalf of citizens from Puerto Rico, a territory under the dominion of the United States; (3) in making "all needful Rules and Regulations respecting the Territory" of Puerto Rico, the United States regulated and subsidized education in *Spanish* for its citizenry therein; and (4) the 1922 English-literacy restriction on suffrage in the N. Y. S. Constitution had its genesis in hostility to certain races and in an attempt to repress "foreign" ideas.

Statement of the Case

Appellees, registered voters in Kings County, New York, filed their complaint on August 6, 1965, seeking a judgment declaring Section 4(e) of the Voting Rights Act of 1965 unconstitutional and enjoining the Attorney General of the United States from enforcement thereof. Since the New York City Board of Elections, upon advice of the

City's Corporation Counsel, was registering citizens from Puerto Rico literate in Spanish, pursuant to §4(e), appellees sought and were permitted to amend their complaint, naming the Board as a party defendant and requesting that that defendant be restrained from obeying the challenged statute. The Board appeared generally but denied subject matter jurisdiction since it nowhere appeared from the statute that Congress intended that private citizens benefiting from a proscribed state discrimination could use the federal courts to enjoin obedience to the very Act that prohibited the discrimination. It was the Board's position that appellees' avenue of appeal to this Court was via the state courts and that the Governor could remove any local election board that refused to enforce state law in deference to a supervening federal statute.* In holding Section 4(e) unconstitutional and restraining appellant from obedience thereto, as aforenoted, challenge to the court's jurisdiction was rejected.

POINT I

Congress is expressly empowered to enforce the Equal Protection Clause which protects the suffrage rights of citizens.

As stated in *United States* v. *County Bd. of Elections of Monroe Co., N. Y.*, 248 F. Supp. 316 (D. C., W. D. N. Y.,

* Similarly, in the companion case (No. 673) of *Cardona* v. *Power et al., constituting the Board of Elections of the City of New York*, the Board entered a general denial and effectively withdrew after invoking N.Y.S. Executive Law, §71, requiring the Attorney General of N.Y. to defend State Law attacked as unconstitutional, i.e., the English literacy requirements of N.Y.S. Constitution, Art. II, Sec. 1.

1965), wherein a three-judge court unanimously upheld the constitutionality of Section 4(e), the Voting Rights Act of 1965 "represented a re-commitment by this country to the fundamental principles upon which it was founded. * * * It was devised to eliminate second-class citizenship wherever present."

Rejecting the position of the majority in the instant case—i.e., that "[t]raditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate" (R. 84)—the Court, in *Monroe County*, held that "Congress pursuant to the Fourteenth Amendment was empowered to correct what it reasonably believed to be an arbitrary state-created distinction" (248 F. Supp., at p. 321). That Court also noted (*ibid.*), that Congressional power to eliminate unreasonable discrimination and assure equal protection of the laws is expressly granted by Section 5 of the Fourteenth Amendment, citing *Ex parte Virginia*, 100 U. S. 339 (1879). In the cited case, this Court held, with respect to the Fourteenth Amendment (at pp. 345-6):

> "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view * * * and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis in original.)

See, also,

United States v. *Classic,* 313 U. S. 299, 314-316, 319-320 (1941);
Virginia v. *Rives,* 100 U. S. 313, 318 (1879).

And, as this Court noted in the same case, when Congress exercises its constitutional powers under the Fourteenth Amendment, the powers which the State might have enjoyed give way to those enactments (100 U. S., at p. 346). Further, in discussing the Equal Protection Clause of the Fourteenth Amendment, and the specific language of the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments, this Court placed special emphasis upon the fact that it is *primarily* the function of Congress, and not of the judiciary, to "secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws," as follows (100 U. S., at p. 345):

> "It is not said that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged." (emphasis in original). See, *Fay* v. *New York,* 332 U. S. 261, 283 (1947); *Monroe* v. *Pape,* 365 U. S. 167, 171-2 (1961).

And the principles thus set forth in *Ex parte Virginia* in 1879 were but recently restated, and with equal emphasis, by this Court in construing those sections of the Voting Rights Act of 1965 adopted pursuant to Congressional enforcement powers under the Fifteenth Amendment (*South Carolina* v. *Katzenbach,* —— U. S. —— [1966]).

In *Virginia* v. *Rives*, 100 U. S. 313, 318 (1879), this Court again expressly stated that "[i]t is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws," and that "Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State." In short, freedom from unreasonable discrimination is one of the privileges and immunities secured by the Constitution of the United States. *United States* v. *Cruikshank, et al.*, 92 U. S. 542, 555-6 (1875). In addition, it has been expressly recognized that the "immunity from unfriendly discrimination * * * placed by the amendment under the protection of the general government and guaranteed by it" and which "may be enforced by Congress by means of appropriate legislation" (*Ex parte Virginia, supra*, at p. 345), extends to the right of suffrage and to rectifying any dilution thereof resulting from unfair state standards for apportioning state legislatures (*Reynolds* v. *Sims*, 377 U. S. 533, 566, 577, 579 [1964]), or unfair state standards for voter qualifications (*Carrington* v. *Rash*, 380 U. S. 89, 96-7 [1965]; *Louisiana* v. *United States*, 380 U. S. 145 [1965]).

While, as noted in the dissenting opinion of Justice Douglas, in *United States* v. *Classic*, 313 U. S. 299, 337 (1941), "Congress has been fairly consistent in recognizing state autonomy in the field of elections"—this cannot be deemed an abdication or abandonment of constitutional power. As this Court has previously had occasion to point out, and with respect to Congressional power under the Fourteenth Amendment, "it is only because the Congress of the United States through long habit and long years of forbearance had, in deference and respect to the States,

refrained from the exercise of these powers, that they are now doubted" (*Ex parte Yarbrough*, 110 U. S. 651, 662 [1884]). The court below, however, insisted that Congressional failure to legislate with respect to discriminatory voter qualifications in the past, "proved" that Congress had no power to do so now. Noting that the "right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States" (R. 84-85), and citing *Minor* v. *Happersett*, 21 Wall. 162, 177 (1874), the court below noted that prior to enactment of the Voting Rights Act of 1965, "whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States" (R. 88).

Thus, not only Congressional forbearance, but affirmative Congressional action in soliciting state ratification of amendments affecting suffrage requirements and qualifications, confirmed the court below in its view that "[t]his subject is one over which the Congress has no power to legislate" (R. 84). And in support of its conclusion that this applied to Congressional action dealing with state-prescribed English-literacy tests, the Court cited *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50 (1959), wherein an English-literacy test in North Carolina was held to be a reasonable voter qualification.* The Court below

* Since English was the dominant language of instruction in the educational facilities afforded the native born citizen in that case, this Court held English-literacy to be a reasonable way to promote intelligent use of the ballot (360 U. S. 45, 51-2). *Lassiter* did not involve denial of suffrage to native born citizens of the United States, educated at Federal expense in a language other than English, and state denial of suffrage regardless of whether such instruction promoted intelligent use of the ballot or not.

stated that *Lassiter* is "practically on all fours with the case at bar" (R. 86), quoting therefrom, as follows (R. 87):

> "So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315."

In *United States* v. *Classic*, 313 U. S. 299 (1941), and at p. 315, as cited by the court below from *Lassiter*, this Court stated—"[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, see *Minor* v. *Happersett*; 21 Wall. 162, 170; *United States* v. *Reese*, 92 U. S. 214, 217-218; *McPherson* v. *Blacker*, 146 U. S. 1, 38-39; *Breedlove* v. *Suttles*, 302 U. S. 277, 283, this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by §2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under §4 and its more general power under Article I, §8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' (cases cited)."

Referring again to Congressional power under Article I, §8, clause 18, this Court in *United States* v. *Classic*, stated (at p. 320), "Congress is given authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers

vested by this Constitution in the Government of the United States or in any department or officer thereof.' " As already noted (*supra,* pp. 8-10), this Court has clearly recognized, and expressly held, that the Equal Protection Clause protects from unreasonably discriminatory voter qualifications, and that Congress has primary responsibility under the Fourteenth Amendment to secure to all persons the equal protection of the laws. There can be little doubt, therefore, that the lower court erred in its conclusion that "[t]his subject is one over which the Congress has no power to legislate."

Nor can Congress be shorn of its powers via the lower court's suggestion that since Congress had resorted to Constitutional amendment in effecting prior restrictions "on the power of the States to prescribe qualifications for voters" (R. 87), this evidences "the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislature enactment" (R. 88). Whether Congress truly believed it lacked the power to legislate on voter qualifications, or believed that Constitutional amendment was a more appropriate, permanent and binding form of legislation, or "in deference and respect to the States, refrained from the exercise of these powers" (*Ex parte Yarbrough,* 110 U. S. 651, 662 [1884]) is irrelevant since Constitutional power cannot constitutionally be voluntarily surrendered, or lost by misconception, default or even political expediency.

Moreover, the lower Court's reliance upon Constitutional amendments (R. 87-88) barring state abridgment

or denial of suffrage "on account of race, color or previous condition of servitude" (15th Amendment—1870), "on account of sex" (19th Amendment—1920), "by reason of failure to pay any poll tax or other tax" (24th Amendment —1964), simply cannot support its conclusion that every limitation upon the power of the States to prescribe qualifications for voters must be imposed by Constitutional amendment. As noted in *Minor* v. *Happersett,* 21 Wall. 162, 176 (1874), when the Constitution was formulated and the republic first created, the right of women to vote was unknown—"this right was only bestowed upon men and not upon all of them." The same, of course, was traditionally true of disfranchised slaves, who were not even citizens. Whether it was the drastic and fundamental nature of the change effected by extending the ballot to women and to a race previously held in bondage—both of which classes had been subjected to inferior political status long before the inception of the United States—that led to Constitutional amendment as the means of expunging such long-prevailing prejudices from the common law, or the desire to make the change permanent and less easily subject to repeal, is irrelevant.*

As to recent Congressional action in eliminating, via Constitutional amendment, poll tax qualifications for voting in elections for Federal office, this Court effectively

* In contrast, the fact is, as appellees themselves pointed out in the Court below by citing Revised Record of the N. Y. S. Constitutional Convention of 1894, vol. I, pp. 287-8, the traditional practice in this country was to extend the suffrage to immigrants, no matter what language they spoke, in order to promote immigration and the consequent development of new lands, by affording new settlers an immediate stake in the political life of the country. Thus, as pointed out in the debates in the cited reference, 16 states permitted *aliens* to vote in 1894.

recognized the strength of political opposition to such action, and the consequent resort to the more difficult path of constitutional amendment. Thus, in *Harmon* v. *Forssenius,* 380 U. S. 528, 538-9 (1965), the Court said—"[p]rior to the proposal of the Twenty-fourth Amendment in 1962, federal legislation to eliminate poll taxes, either by constitutional amendment or statute, had been introduced in every Congress since 1939. The House of Representatives passed anti-poll tax bills on five occasions and the Senate twice proposed constitutional amendments." As stated in the House Report (No. 439, 89th Congress, 1st Sess., June 1, 1965) on the "Voting Rights Act of 1965," Section 10 of which effectively outlaws *via legislation* poll tax qualifications for voting in elections for state office—"[t]he action of Congress in proposing the abolition of the poll tax for Federal elections was a compromise" (at p. 22).

It is, therefore, clear that no admission can properly be exacted from Congress—on the basis of past action via Constitutional amendment barring state denial of suffrage—that Congress had itself recognized that "[t]his subject is one over which the Congress has no power to legislate" (R. 84). This is particularly true in construing federal legislation predicated upon a denial of the very proposition deemed admitted.

It is equally true that the lower court improperly departed from firmly established law recognizing Congressional power under the Fourteenth Amendment to remove unreasonable barriers to basic rights of citizenship.

POINT II

Congress has power under the Fourteenth Amendment to remove suffrage barriers violative of universally recognized standards to which the Nation has pledged itself, which resulted from hostility to certain nationalities and races, and which clash with specific national commitments.

a. Language barriers to the right of suffrage may properly be held to constitute unjustifiable discrimination.

The concern of Congress to secure the suffrage rights of all citizens free of discriminatory state legislation is clearly noted in the 1959 Report of the U. S. Commission on Civil Rights (abridged—p. 9)—"In the assignment of this Commission, Congress indicated that its first concern is with the rights of citizens to vote and the right of all persons to equal protection of the laws. These rights are the very foundation of this Republic."

By 1963, that Commission recommended "the enactment by Congress of some form of uniform voter qualification standards" as the "only effective method of guaranteeing the vote for all Americans" (Report of U. S. Commission on Civil Rights, 1963, "Recommendations," pp. 27-28). This recommendation was not, however, adopted by Congress in the enactment of Section 4(e) of the Voting Rights Act of 1965. That section does not represent direct and primary legislation fixing standards of voter qualifications for all the states. It is, instead, remedial legislation correcting the unjustifiable exclusion, from basic

rights of suffrage, of native-born citizens educated in their mother tongue under the Government of the United States. As will be shown, such exclusion from the ballot on grounds of language, and despite literacy and intelligence, violates universally accepted standards subscribed to by all member nations of the United Nations, placed the United States in violation of its pledge under the Charter to promote observance of "fundamental freedoms for all without distinction as to race, sex, language or religion," and violated international obligations specifically undertaken by the United States with respect to its citizens from Puerto Rico.

In *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 51 (1959), this Court upheld a North Carolina English literacy requirement that had none of the invidious objectives historically rooted in N. Y. S. Constitution, Art. II, §1 (*infra*, pp. 22-25), and which was not shown to affect substantial numbers of United States citizens literate in the language and culture of that section of United States territory in which they were born. The majority's statement that *Lassiter* "is practically on all fours with the case at bar" (R. 86), ignores the fact that the *primary* responsibility for investigating and eliminating unreasonable discriminatory practices affecting suffrage rights, rests with Congress under the Fourteenth Amendment, and not with the courts. Moreover, it overlooks the fact that the thrust of *Lassiter* was that "literacy has some relation to standards designed to promote intelligent use of the ballot" (at p. 51), and not that English-literacy has some relation to promoting intelligent use of the ballot where the dominant language of instruction for native-born and

literate citizens of the United States is other than English and where mass media of communications in such language assure as intelligent use of the ballot as would English-literacy (R. 50-71).*

In the very year in which *Lassiter* was decided, moreover, the United States Commission on Civil Rights reported to the Congress that "this Commission has found that Puerto Rican American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York" (1959 Report of U. S. Comm. on Civil Rights, abridged version, p. 58). The very purpose of the Commission's "existence is to find facts which may subsequently be used as the basis for legislative or executive action" (*Hannah* v. *Larche*, 363 U. S. 420, 441 [1960]).

Where Congress bears *primary* responsibility for enforcing Constitutional requirements, it is for Congress "to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U. S. 63, 67 (1965). It was the duty of Congress, therefore, to investigate and

* The New York courts have previously upheld the constitutionality of New York's literacy requirement. *Camacho* v. *Doe*, 31 Misc. 2d 692 (S. Ct., Bx. Co., 1958), aff'd without opinion, 7 NY 2d 762 (1959). On the authority of *Camacho* v. *Doe*, 7 NY 2d 762 (1959), the New York English-literacy requirement was upheld in *Camacho* v. *Rogers*, 199 F. Supp. 155 (S. D. N. Y., 1961), although the Court acknowledged that Spanish newspapers in New York are fully informative on state and local political affairs. However, in *Matter of Cardona* v. *Power*, 16 NY 2d 639, 640-1 (1965), "New York State's literacy-in-English requirements" were found to be "unreasonable and unconstitutionally discriminatory" by Chief Judge Desmond, dissenting with Fuld and Burke, JJ., when applied to a "competent, intelligent and reasonably well-educated and informed native-born American citizen."

cull conclusions about the relationship of "tests and devices," "literacy tests," extent of registration and voting, state discrimination denying "perfect equality of civil rights and the equal protection of the laws" (*Ex parte Virginia, supra,* at pp. 345-6)—and to correlate its findings with universally recognized standards of fair and reasonable limitations on the right of suffrage. "As this Court has stressed on numerous occasions, '[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' *Reynolds* v. *Sims,* 377 U. S. 533, 555. The right is fundamental 'because preservative of all rights'. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370" (*Harmon* v. *Forssenius,* 380 U. S. 528, 537 [1965]). That Congress could regard state language barriers as unjustifiably discriminatory and a proper subject for the exercise of its powers under the Fourteenth Amendment is readily apparent.

Thus, as stated in a *"Study of Discrimination in the Matter of Political Rights"* (1962), a study conducted by the United Nations Commission on Human Rights and the Economic and Social Council (Sub-Commission on Prevention of Discrimination and Protection of Minorities), "the development of modern methods of mass communication such as radio and television" has negated the rationale commonly advanced in justification of literacy tests, namely, that only a person who can read and write can keep abreast of public affairs and vote intelligently (at p. 32). The "fact is that where literacy tests subsist they have in many cases been maintained as a device for eliminating, or at least discouraging, prospective voters belonging to particular

elements of the population" (*ibid.*). And, "when citizens of a country are denied the right to vote because they cannot pass a literacy test in a language which is not their mother tongue, this may be deemed discrimination" (*ibid.*, p. 33). "Restrictions of this nature are even more unjustifiable when applied to nationals by birth who have lived in one part or territory of a country, where they have been educated in a particular language, and have moved to another part or territory where a different language is officially recognized" (*ibid.*).

As stated in the 1959 Report of the United States Commission on Civil Rights (abridged version—p. 90)—with respect to State discriminatory practices which disfranchise citizens of the United States—"There exists here a striking gap between our principles and our everyday practices. This is a moral gap. It spills over into and vitiates other areas of our society. It runs counter to our traditional concepts of fair play. It is a partial repudiation of our faith in the democratic system. It undermines the moral suasion of our national stand in international affairs."

The United States has, in fact, bound itself by international treaty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (U. N. Charter, Arts. 55-56; 58 Stat. 1045). As stated with respect thereto, by Mr. Justice BLACK, concurring in *Oyama* v. *California*, 332 U. S. 633, 649-50 (1948)—"How can this nation be faithful to this international pledge if state laws" running directly counter thereto "are permitted

to be enforced?" No state that defies universally recognized standards for safeguarding fundamental rights for all classes of the citizenry, inclusive of the right of suffrage, and fashions standards that directly conflict therewith, can avoid discrimination violative of the Equal Protection Clause even in the absence of Congressional action in enforcement of an international obligation to observe such universally accepted standards regarding permissible barriers to the basic right of suffrage. See, *Sei Fujii* v. *State,* 242 P. 2d 617, 621-2 (S. Ct., Cal., 1952), where it is noted that the provisions of Article 55, while not self-executing, were "framed as a promise of future action by the member nations."

Thus, it is clear that Congress could properly regard state erected language barriers to the basic right of suffrage as unjustifiably discriminatory and a proper subject for the exercise of its powers under the Fourteenth Amendment. Needless to say, all of the substantive powers of Congress are to be considered together in passing upon constitutionality. *Legal Tender Cases,* 12 Wall. 457, 532 (1872); *United States* v. *Constantine,* 296 U. S. 287, 294 (1935); *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359, 363 (1941).

b. Article II, Sec. 1 of the N. Y. S. Constitution had its genesis in hostility towards certain nationalities and races.

That Congressional action in *partially* mitigating the unconstitutionally discriminatory effect of New York's literacy test is long overdue, may be readily demonstrated. Thus, the New York State constitutional provision (Art. II, §1) disfranchising all citizens unable "to read and write English" was expressly intended to effect discrimination against certain nationalities and races based on hostility to those nationalities and races. This was flatly admitted by the original sponsor of such constitutional amendment, Charles H. Young, who first proposed it at the New York State Constitutional Convention of 1915, as follows:

> "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races. * * * The danger has begun * * *. We should check it * * *."
>
> (3 N. Y. S. Constitutional Convention 3010, Revised Record 1916; see, pp. 3015-17, 3021-55; see, also, Debate on the Literacy Test, N. Y. Times, Section 7, p. 2, Oct. 23, 1921).*

* This background concerning the inception of New York's English-literacy requirement was placed before Congress. See, "Literacy Tests and Voter Requirements in Federal and State Elections—1962", p. 511, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, 87th Congress, 2d Sess., pp. 274, 301-315, 500-513; "Voting Rights—1965", Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Rep., 89th Cong., 1st Sess., pp. 508-520.

It was not, however, until 1921—during a postwar period that expressed its hostility to certain races, nationalities and beliefs, via many repressive measures and deprivations of civil rights, leading Charles Evans Hughes to question "whether constitutional government as heretofore maintained in this republic could survive another great war even victoriously waged" (CHAFFEE, *Free Speech in the United States*, p. 102 [1948]; see, also, pp. 237, 278-9, 590-1)—that Mr. Young's proposed literacy requirement was adopted. Thus, even if Congress lacked the primary power to prohibit, restrict or abate discriminatory denial of voting rights and of equal protection of the laws—powers expressly granted to Congress by the Fourteenth Amendment—the intent and motivation of state legislation and its actual effect are important fields of inquiry in determining whether state action is constitutional. *Harmon* v. *Forssenius*, 380 U. S. 528, 543 (1965); *Reynolds* v. *Sims*, 377 U. S. 533, 561 (1964); *Oyama* v. *California*, 332 U. S. 633, 646, 651 (1948); see, *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556-7 (1946); *Davis* v. *Schnell*, 81 F. Supp. 872, 879-80 (S. D. Ala., 1949); aff'd 336 U. S. 933 (1950). And this is particularly so where the most fundamental right, "preservative of all rights," is concerned.

It is equally clear from the historical background of Article II, §1 of the New York State Constitution, that thought-control in the form of barring "foreign" ideas was at the very heart of New York's literacy-in-English requirements aimed at nationalities and races which the Legislature of the State deemed inferior. Needless to say, the fact that huge numbers of immigrants from poverty-stricken areas of Southern and Eastern Europe sought

employment and settled in large metropolitan centers, such as the City of New York, and could not achieve the required literacy in English, served admirably to retain legislative power in rural areas by disfranchising citizens who could not thus achieve "the mental qualities of our race," to use the language of Mr. Young. However, hostility to races and nationalities, to "foreign" ideas, to the electoral strength of populous urban centers and to the "danger" implicit therein, are not legally sufficient props to support state classifications of citizens of the United States for purposes of enfranchising some and disfranchising others.* As this Court recently stated with respect to state-imposed qualifications for voting (*Carrington* v. *Rash*, 380 U. S. 89, 90 [1965]):

> "But the fact that a State is dealing with a distinct class and treats the members of that class equally does not end the judicial inquiry. 'The courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*.'" (Emphasis added.)

State classifications *affecting civil rights* are on a fundamentally different footing, insofar as the Equal Protection Clause is concerned, from classifications in other fields (*Reynolds* v. *Sims*, 377 U. S. 533, 561 [1964]; *Schneider* v. *State*, 308 U. S. 147, 161 [1940]; *Guinn* v. *United States*, 238 U. S. 347, 366 [1915]). And different standards apply

* Insofar as a literacy-in-English requirement encourages citizens to read and write English, it is clearly commendable, but this laudable purpose may not be effected by withholding from citizens those basic rights, derivative of all rights, which the Constitution of the United States guarantees. *Meyer* v. *Nebraska*, 262 U. S. 390, 401 (1923); *Thomas* v. *Collins*, 323 U. S. 516, 529-30 (1945); *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1, 17-18 (1964).

to presumptions in favor of State classifications when they affect rights of suffrage, "rights so vital to the maintenance of democratic institutions" (*ibid.*, see, also, *Morey* v. *Doud*, 354 U. S. 457, 471 [1957]).

Thus, where "history has seen a continuing expansion of the scope of the right of suffrage in this country" (*Reynolds* v. *Sims*, 377 U. S. 533, 555 [1963]), Congress may properly view with concern such regressive action, via language barriers erected in the State of New York under the circumstances above outlined, especially where they ignore both universally recognized standards to which this Nation is committed, and as will be shown, specific commitments of the United States with particular regard to citizens from Puerto Rico. That Congress may take corrective action under the Equal Protection Clause against state enactments which operate to deny equal treatment affecting fundamental rights of citizenship has been recognized for almost a hundred years. See, *Civil Rights Cases*, 109 U. S. 3, 13-14 (1883), and cases cited *supra*, pp. 8-10.

POINT III

Under Art. IV, §3, Congress may constitutionally prevent a state from effectively ignoring the policy of, and international obligations undertaken by, the United States with respect to citizens of Puerto Rico.

Reviewing the policy of the United States with respect to Puerto Rico, the dissenting opinion herein, by Circuit Judge McGowan, points out that that policy had always been to afford the People of Puerto Rico "a true option to preserve and extend a cultural tradition as venerable

as our own" (R. 94-95), and that this was, in part, accomplished by financing education in Spanish as the dominant language of instruction (R. 97-98). With respect to that policy, the dissent observes that Congress has established "a tradition of enlightened treatment of Puerto Rico which is currently one of the firmest props of our pretensions to a respectful hearing in the councils of the world. Section 4(e) of the Voting Rights Act of 1965 is but the latest Legislative act in this tradition" (R. 95).

Tracing the historical development of Puerto Rico as a part of United States territory, the Circuit Judge notes (R. 92 fn.) that "Puerto Rico came under American rule by virtue of the Treaty of Paris of 1899, ending the Spanish-American War. That treaty provided, among other things, that 'the civil rights and political status of the native inhabitants of [Puerto Rico] shall be determined by Congress.' 30 Stat. 1754, at 1759," and that Congress has broad "power to 'make all needful Rules and Regulations' in respect to the territories" (U. S. Const. Art. IV, §3), citing, *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 674 (1945); *Public Utility Comm'rs* v. *Yuchausti & Co.,* 251 U. S. 401, 406 (1920); *Binns* v. *United States,* 194 U. S. 486, 491 (1904); *Hawaii* v. *Mankichi,* 190 U. S. 197, 218 (1903); *Rabang* v. *Boyd,* 353 U. S. 427, 432 (1957). The opinion further notes (R. 97), citing *Balzac* v. *Porto Rico,* 258 U. S. 298, 311 (1922), that "The Jones Act in 1917 gave American citizenship to all Puerto Ricans, and permitted them free entry into this country."

By 1952, however, in order to secure exemption from United Nations control over Puerto Rico as "colonial territory" of the United States, pursuant to Article 73(e)

of Chapter XI of the United Nation's Charter, it was necessary to assure the United Nations, among other things, that Puerto Ricans are not subject to having any dominant language impressed upon them as a condition to enjoying basic rights of citizenship. This was to preclude possible classification of Puerto Rico as a territory subject to the International Trusteeship System of the United Nations which System was designed to effectuate "self-government or independence" (Charter, Chap. XII, Articles 75-76).

Thus, the "Memorandum by the Government of the United States, etc.", submitted to the United Nations on March 21, 1953, states that the people of Puerto Rico have enjoyed "universal adult suffrage since 1939. There have been no property requirements since 1906 and the last literacy requirements were removed in 1935" (see, *U. S. Participation in the U. N.*, Report by the President to the Congress for the year 1953, pp. 181 *et seq.;* and 28 Dept. State Bulletin 587). The United States' commitment to the United Nations also states that "the Constitution of the Commonwealth (of Puerto Rico) is similar to that of a State of the Federal Union," and that the "people of Puerto Rico continue to be citizens of the United States as well as Puerto Rico and the fundamental provisions of the Constitution of the United States continue to be applicable to Puerto Rico" (*ibid.*).

On the strength of the United States' commitment above delineated, the General Assembly adopted a Resolution declaring Chapter XI of the Charter inapplicable to Puerto Rico (*id.*). In short, observance of the basic requirement of the U. N. Charter, to promote "universal respect for, and observance of fundamental freedoms for all without distinc-

tion as to race, sex, language or religion" was thus undertaken by the United States with specific reference to citizens from Puerto Rico. In exercising its power under Art. IV, §3, Congress can validly consider the standards to which the Nation had subscribed in its international agreements. Under the Supremacy clause (Art. VI, cl. 2), any state suffrage requirement based on language must yield to specific Congressional enactment insofar as such suffrage requirement affects citizens from Puerto Rico, educated under the Territorial powers of the United States, and with respect of whom specific international obligations have been undertaken by the United States to the effect that no dominant language will be impressed upon such persons as a condition to enjoying the fundamental freedoms referred to in the Charter. *Slaughter-House Cases,* 16 Wall. 36, 71, 77-79 (1873); *Crandall* v. *Nevada,* 6 Wall. 35 (1868); *Tennessee* v. *Davis,* 100 U. S. 257, 263 (1879).

In short, and as stated by the three-judge Court in the *Monroe County* case, "Congress acted well within its constitutional limits when it legislated to prevent New York from prohibiting or, at the very least, substantially impeding the integration of Puerto Rican emigrants into its political life through the imposition of an English language requirement for voter registration."

CONCLUSION

1. Protection of suffrage rights is a valid subject of Congressional action under the Fourteenth Amendment;

2. In legislating to enforce rights under the Fourteenth Amendment, Congress could consider the standards estab-

lished by international treaty, as well as the history of hostility to certain nationalities which led to adoption of Art. II, §1 of the New York State Constitution;

3. In exercising its broad power to make rules and regulations for territories, Congress could protect suffrage rights against state infringement and could validly consider the standards established by treaty obligation.

The order appealed from should, therefore, be reversed and Section 4 (e) of the Voting Rights Act of 1965 declared a valid enactment.

March 11, 1966.

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